Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

September 2008

Ignorance of defendant's capacity does not toll statute of limitations. Under the Federal Tort Claims Act, claims must be presented within two years after accrual. Plaintiff did not file suit until almost three years after an automobile accident involving a United States Navy officer. The court rejected her claim that his ignorance of the involvement of a federal employee in her accident tolled the statute of limitations. *Hensley v. United State*s (9th Cir.; July 9, 2008) 531 F.3d 1052, [2008 DJDAR 10423].

Where plaintiff knew defects had been remedied, disability rights suit was frivolous. In *Molski v. Arciero Wine Group* (Cal. App. Second Dist., Div 6; July 7, 2008) 164 Cal.App.4th 786, [79 Cal.Rptr.3d 574, 2008 DJDAR 10321], plaintiff filed suit alleging violations under, among other statutes the Disabled Persons Act (*Civ. Code* §§ 54, ff.). Before he had filed the suit, defendant had obtained undisputed evidence that the defects, which allegedly limited access to disabled persons, had been completely remedied. The Court of Appeal affirmed a finding by the trial court that the suit was frivolous and affirmed a $33,000 attorney fee award in favor of the defendant. The court noted incidentally that Mr. Molski had filed more than 400 such actions and had been declared a vexatious litigant both in federal and in state courts.

Incidentally, Mr. Molski won his appeal in a federal case against another winery just two days after California's Second District's decision. *See, Molski v. Foley Estates Vineyard and Winery, LLC.* (9th Cir.; July 9, 2008) 531 F.3d 1043, [2008 DJDAR 10399].

Expert evidence of "make up sex" was properly excluded. Defendant engaged in a physical altercation with his wife and then raped her. The trial court precluded defendant from offering the testimony of an expert on marital sex who was prepared to testify that "make up sex" following a fight was more arousing than under more placid circumstances. The Court of Appeal affirmed, holding the proffered testimony was not relevant on the issue of whether defendant believed his wife consented to sexual intercourse because "make up sex" was within the jury's common knowledge. *People v. Sandoval* (Cal. App. Third Dist.; July 11, 2008) 164 Cal.App.4th 994, [79 Cal.Rptr.3d 634, 2008 DJDAR 10686].

"No contest" clause in trust does not preclude contest of amendments to the trust. Where a trust contained a "no contest" clause, but, subsequent amendments to the trust instrument did not, a contest of the amendments did not trigger the clause in the original document. *Perrin v. Lee* (Cal. App. Fourth Dist., Div.3; July 16, 2008) 164 Cal.App.4th 1239, [79 Cal.Rptr.3d 885, 2008 DJDAR 10899].

Non-parties to arbitration agreement are entitled to judicial review of arbitrator's discovery orders. In *Berglund v. Arthroscopic & Laser Surgery Center* (Cal.Supr.Ct.; July 17, 2008) 44 Cal.4th 528, [187 P.3d 86, 79 Cal.Rptr.3d 370, 2008 DJDAR 10967], parties to an arbitration agreement sought discovery from a third party who had not agreed to the arbitration. When the latter party refused to comply, the arbitrator ordered it to do so and the Superior Court denied its motion for a protective order. The Court of Appeal reversed the order and the Supreme Court affirmed the decision of the Court of Appeal. Without a party's consent to the arbitration, the arbitrator's decision is not final and is subject to judicial review.

Alternative remedies where default judgment exceeds prayer. Where default judgment exceeds prayer of complaint court has discretion to set aside default or reduce judgment to amount of prayer. *Julius Schifaugh IV Consulting Service, Inc. v. Avaris Capital, Inc*. (Cal. App. Fourth Dist., Div. 3; July 18, 2008) 164 Cal.App.4th 1393, [79 Cal.Rptr.3d 910, 2008 DJDAR 11077].

Juror's applause during closing argument is not prejudicial. In *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (Cal. App. Second Dist., Div.6; July 21, 2008) 164 Cal.App.4th 1440, [80 Cal.Rptr.3d 495, 2008 DJDAR 11135], the Court of Appeal affirmed the denial of a new trial. Although one of the jurors applauded during defense counsel's closing argument, the trial court, after making appropriate inquiries of the jurors, properly decided that, although the applause constituted misconduct, it did not prejudice the jury.

Employers must provide rest periods but need not ensure they are taken. Labor law requires the employer to provide rest and meal periods. But the Fourth

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District Court of Appeal has held that, although employers may not impede, discourage, or dissuade employees from taking these rest and meal periods, they need only provide for them and need not ensure that employees actually take the required times off. Similarly when employees work "off the clock," employers are only liable if they knew of should have known their employees were doing so. *Brinker Restaurant Corp. v. Sup.Ct.* (Hohnbaum) (Cal. App. Fourth Dist., Div. 1; July 22, 2008) 165 Cal.App.4th 25, [80 Cal.Rptr.3d 781, 2008 DJDAR 11267].

Court lacks power to award fees as sanction for violating in limine order. In *Clark v. Optical Coating Laboratory, Inc.* (Cal. App. First Dist., Div. 1; July 24, 2008) 165 Cal.App.4th 150, [80 Cal.Rptr.3d 812, 2008 DJDAR 11446], plaintiff violated an *in limine* order, resulting in a mistrial. The trial court awarded defendants their attorney fees, costs, and expert witness fees for a total of $1.1 million. The Court of Appeal reversed, holding that there was no statutory authority for such an award because neither *Code Civ. Proc.* §§128.5, nor 128.7 applied. The appellate court also held that the court lacked inherent authority under *Code Civ. Proc.* §187 to create this remedy.

Retailers who "pass on" overcharges to their customers cannot sue for price fixing. In *Clayworth v. Pfizer, Inc.* (Cal. App. First Dist., Div. 2; July 25, 2008) (As mod. Aug. 19, 2008) 165 Cal.App.4th 209, [80 Cal.Rptr.3d 847, 2008 DJDAR 11591]), pharmacies sued pharmaceutical companies for price fixing under the Cartwright Act (*Bus. & Prof. Code* §§ 16700 ff.) and the Unfair Competition Law (*Bus. & Prof. Code* §§ 17200 ff.). The trial court granted defendants' motions for summary judgment and the Court of Appeal affirmed, holding that because the pharmacies passed the increased cost on to their customers, they were not injured by the price fixing and thus, lacked standing to sue.

"Coerced" production of privileged document does not waive attorney-client privilege. Voluntary disclosure of a document protected by the attorney-client privilege to a third party waives the privilege and production may be compelled. But where defendant transmitted such a document to a government agency, under threat of indictment or serious regulatory consequences should the document not be transmitted, the disclosure was involuntary and plaintiff was not entitled to its production. *The Regents of the University of California v. Sup.Ct. (Aquila Merchant Services, Inc.)* (Cal. App. Fourth Dist., Div. 1; July 30, 2008) 165 Cal.App.4th 672, [81 Cal.Rptr.3d 186, 2008 DJDAR 12003].

Pro per is "attorney of record" even though advised by admitted lawyer. Where a defendant is advised that plaintiff, appearing in *propria persona*, is assisted by a lawyer, defendant's attorney is nevertheless free to communicate with the *pro per* plaintiff. In *McMillan v. Shadow Ridge at Oak Park Homeowners' Association* (Cal.App. Second Dist., Div. 6; August 4, 2008) 165 Cal.App.4th 960, [2008 DJDAR 12211], after plaintiff substituted in as a *pro per* litigant, her former attorney of record advised defendant's counsel that he would continue to advise her. After defense counsel communicated with plaintiff directly, she sought to disqualify him. The trial court denied the motion and the Court of Appeal affirmed. By assisting plaintiff, the lawyer could not limit the ability of opposing counsel to communicate with the "attorney of record."